



U.S. Citizenship
and Immigration
Services

BC

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FILE: WAC 02 140 50971 Office: CALIFORNIA SERVICE CENTER

Date:

JAN 22 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

ON BEHALF OF PETITIONER:

Identifying data deleted to
prevent unauthorized
invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision is withdrawn and the appeal will be remanded to the service center.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a multineedle chain-stitch operator. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is July 27, 1998. The beneficiary's salary as stated on the labor certification is \$6.41 per hour which equates to \$13,332.80 per annum. The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2).

With its initial visa petition filing, the petitioner submitted incomplete individual tax returns for 1999 and 2000. Because the evidence was insufficient for the director to determine if the petitioner had the ability to pay the proffered wages, a request for evidence was issued. The request for evidence sought complete tax returns illustrating the petitioner's continuing financial ability to pay the proffered wages from the priority date including any W-2 forms if the beneficiary was employed by the petitioner.

In response to the director's request for additional evidence of the petitioner's ability to pay the wage offered, counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1040 for the years 1998 through 2001. The IRS Forms showed adjusted gross incomes of \$10,754; \$34,385; \$31,727; and \$34,578 respectively. No W-2 forms were submitted; however, the petitioner presented a letter stating that the beneficiary had been employed from January 1995 through July 1998. The petitioner stated that she interrupted the employment relationship at that time upon advice from counsel because the beneficiary did not have employment authorization.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's adjusted gross income in 1998 was less than the wage offered of

\$13,332.80 and denied the petition accordingly.¹ The director noted that this analysis was made without further reducing the petitioner's adjusted gross income for her monthly living expenses, which were unknown.

On appeal, counsel submitted a letter from the petitioner's accountant who asserts that the director did not consider that 1998 was the initial year of the petitioner's business and is "effectively penalizing the petitioner for utilizing tax incentives provided by the IRS to businesses in their initial year." Additionally, the accountant stated that CIS erred by using the tax basis of accounting, and asserted "that the 1998 earnings reflect an adjusted income of \$106,674, **with an excess of earnings over the proffered wage for 1998 of \$93,342 . . .**" The accountants provided a comparison financial statement sheet presenting figures based on taxable income versus unadjusted income. The column to which the accountant refers to as "unadjusted income," or financial figures "unencumbered by tax incentives set forth by the IRS," effectively adds back depreciation and other expenses.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." Thus, the petitioner's accountant's assertions and analysis based on gross figures not reduced by expenses and padded with depreciation will be disregarded.

The petitioner's IRS Form 1040 for calendar year 1998 shows an adjusted gross income of \$10,754. The petitioner could not pay a proffered wage of \$13,332.80 a year out of this income. However, the priority date is July 27, 1998. Thus, the petitioner only needs to prove its ability to pay a pro-rated amount of the proffered wage. 157 days were remaining in 1998 which leaves the petitioner responsible for showing an ability to pay \$5734.93 in wages for the remainder of that year. The petitioner's adjusted gross income of \$10,754 is greater than \$5734.93 and thus may show an ability to pay the proffered wage for 1998.

The petitioner may have also established the ability to pay the wages offered for 1999, 2000, and 2001, since for each year the petitioner's adjusted gross incomes were higher than the proffered wage.

However, the record of proceeding does not contain evidence of the petitioner's living expenses. The director did not ask the petitioner for her living expenses, yet he made reference to them in his decision. Since the petitioner is an individual and reports her income on her individual tax returns, it is critical to ascertain how much to reduce her adjusted gross income by her living expenses, keeping in mind the cost of living in her geographic area of residence. It is expected that the petitioner will provide a detailed and accurate explanation of all living expenses. If the petitioner can prove that her living expenses do reduce her adjusted gross income below an amount less than the proffered wages, then she will not be able to illustrate an ability to pay the proffered wages. If, however, the petitioner can prove that her living expenses do not reduce her adjusted gross income below an amount less than the proffered wages, then she may be able to illustrate an ability to pay the proffered wages.

¹ The director stated that the petitioner illustrated adjusted gross income above the proffered wage for 2001, 2000, and 1999. Although not overtly stated, the director presumably denied the petition for failure to show a *continuing* ability to pay the proffered wage.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.